IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 101 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GAZNAFARALI FATEHALI HAKIM

Versus

RATILAL MAGANLAL PANCHAL

Appearance:

MR. NIRAV K. MAJMUDAR FOR MR PB MAJMUDAR for Petitioner

MS ROOPAL R PATEL for Respondent

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 11 / 02 / 1998

JUDGEMENT

1. This is plaintiff's revision under Section 29(2) of the Bombay Rent Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as `the Act') against the judgement and decree dated 29.1.1982 whereby the Third Extra Assistant Judge, Baroda, dismissed the appeal against the judgement and decree dated 31.7.1980 passed by the judge, Small Causes Court, Baroda, dismissing the plaintiff's suit so far as it relates to recovery of

possession.

2. The necessary facts are that on 2.7.1977 the plaintiff-landlord filed a Regular Civil Suit No. 338 of 1977 in the Small Causes Court at Baroda against the tenant for possession of the demised premises on the ground of default in payment of rent at the rate of Rs. 14/- per month plus 0.50 ps for meter charges for the period 1.7.1975 to 31.3.1977 amounting to Rs. 294/- as rent plus Rs. 10.50 ps. as meter charges, in all totalling to Rs. 304.50 ps. The plaintiff also claimed Rs. 29/- as mesne profit for the period 1.4.1977 to 31.5.1977. The standard rent of the premises was fixed at Rs. Rs. 14/- per month plus 0.50ps for meter charges in previous suit No. 58 of 1952 between the parties. The plaintiff served the tenant with a notice dated 6.4.1977 in accordance with the provisions of Section 12(2) of the Act demanding the arrears of rent. The defendant neither replied to it nor paid the arrears of rent within one month of the service of notice dated 6.4.1977.

3. The defendant filed written statement, denying that he was a defaulter in payment of rent. It was stated that the plaintiff gave notice on 3.10.1975 which was replied within one month i.e. on 1.11.1975. The rent was sent to the landlord by money orders on three occasions but the same were refused. The tenant deposited the entire rent due before the first date of hearing. He also filed an application under Section 11(3) for fixation of the standard rent. No interim standard rent was fixed and the court consolidated the miscellaneous application for fixing the standard rent with the suit for eviction.

4. The trial court held that though the defendant tenant made some mistake in not replying the plaintiff's notice, his conduct shows that he was ready and willing to pay the rent which is evident from the fact that he deposited Rs. 304.50ps on 27.7.1977 the day on which the suit for recovery was filed by the plaintiff. Subsequently, he deposited Rs. 1050/-. The court therefore passed a decree for payment of arrears of rent of Rs. 304.50ps. However, the trial court refused to pass decree for possession as it found that the tenant was ready and willing to pay rent firstly by sending all rent by money orders till 30.11.1975 and thereafter by depositing all rent in court before the first date of hearing. The court also found that no interim standard rent was fixed and no order for payment of rent was made by the court, pending the suit. The court also held that

the notice Exh. 22 was not valid notice as far as the demand of electricity charges were concerned. With respect to the standard rent, the court fixed at Rs. 14/- per month plus 0.50 ps as electric charges. In appeal so far as the notice is concerned, the court reversed the finding of the trial court and held that it was absolutely legal and valid. So far as the standard rent is concerned, the court held that the rent was fixed at Rs. 14/- per month and 0.50 ps as meter charges in the Regular Civil Suit No. 58 of 1952 by a compromise decree and therefore the said issue was barred by res judicata and therefore it was not open for the tenant to reagitate the issue by way of application under Section 11(3) of the Act. With respect to arrears of rent, the court found that the defendant neither replied to the notice nor raised any dispute regarding the standard rent within one month or paid arrears of rent within a period of one month from the date of service of notice dated 6.4.1977 and therefore he did not comply with the provisions of Section 12(3)(a) of the Act. The learned judge also observed that he would have decreed the suit but for the reason of protection given to tenant under Section 12(1) which prohibits the court from passing decree for eviction if the defendant is willing to pay the standard rent and permitted increase. The learned judge found mala fide intention on the part of the plaintiff for refusing money orders Exh. 22, 23 and 25. After the first notice the plaintiff remained silent nearly for a period of 1 1/2 year. Therefore, even before filing of the suit the defendant was ready and willing to pay the standard rent and permitted increase. Even on filing the suit the defendant immediately deposited Rs. 350/- on 27.7.1977 though the actual amount of rent due was only Rs. 330.50ps. The defendant also regularly deposited the amount in the court to the tune of Rs. 1050/- as per the pursis filed by the defendant's advocate before the trial court on 16.7.1980. The actual amount due from the defendant from 1.7.1975 to 30.6.1978 was Rs. 840/-. Therefore, he deposited Rs. 210/- in excess. The appellate court also found that no interim standard rent was fixed by the trial court and therefore ordinarily the defendant was not liable to pay rent regularly. The court relying on the judgement of this court in the case of CHAMPABEN VS. GOPINATH reported in 21 G.L.R. 709 held in such circumstances no decree for eviction could be passed.

5. It is contended by Mr. N.K. Majmudar, learned counsel for the petitioner that the judgement of both the courts below is in disregard to the provisions of Section 12(3)(a) of the Act and various decisions of the Supreme

Court and this court. He also submitted that there is no dispute that tenant did not reply to the notice dated 6.4.1977 under Section 12(2) of the Act and as such it was obligatory on the part of the court to pass a decree under the provisions of Section 12(3)(a) of the Act. He also submitted that since the tenant did not reply to the notice, he cannot be said to be a person ready and willing to pay the arrears of rent. He has placed reliance on various judgements of the Supreme Court and this court. Reference may be made to HARBANSLAL JAGMOHANDAS AND ANOTHER VS. PRABHUDAS SHIVLAL AIR 1976 SC 2005, SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF AIR 1968 SC 1109, JOSHI BHURARAM DATTARAM VS. JIVIBAI D. MULCHAND 1995(3) SCC 416 and the decision of this court in the case of CHUNILAL VS. CHIMANLAL reported in 7 G.L.R. 945. On the other hand Ms. Rupal Patel, learned counsel for the respondent-tenant has submitted that there is no limitation provided for raising the dispute with respect to the standard rent. She placed reliance on the decision of the apex court in the case of I.A. SHAIKH VS. K.S. AGARWAL reported in AIR 1994 SC 1609. On the question of not giving reply to the notice, it is submitted that the plaintiff had given first notice dated 30.10.1975 and the same was replied on 1.11.1975. Therefore, it cannot be said that the notice was not replied. If the petitioner had remained silent and gave second notice it was not necessary for the defendant-tenant to give reply of the same more particularly when the rent was sent to the plaintiff by money orders Exh. 23, 24 and 25 which were refused. Once the plaintiff refused to accept the money order, it was not obligatory on the part of the tenant to continue to send the rent by money order. She emphasised that the conduct of the defendant-tenant shows that tenant was always ready and willing to pay the rent and in fact he deposited the entire rent even before the first date of hearing and further continued to pay the rent till disposal of the suit in spite of the fact that no interim standard rent was determined and therefore the defendant is entitled to protection under Section 12(3)(b) of the Act.

6. In order to appreciate the rival contentions it would be convenient to refer to the material provisions under Section 11(3) and Section 12 of the Act which read as follows: -

"11(3) If any application for fixing the standard rent or for determining the permitted increase is made by a tenant, who has received a notice from

his landlord under sub-section (2) of Section 12, the Court shall make an order directing the tenant to deposit in Court forthwith, and thereafter monthly or periodically, such amount of rent or permitted increases as the Court considers to be reasonably due to the landlord pending the final decision of the application, and a copy of such order shall be served upon the landlord. Out of the amount so deposited, the Court may make order for the payment of such reasonable sum to the landlord towards payment of rent or increases due to him, as it thinks fit. If the tenant fails to deposit such amount, his application shall be dismissed."

"12(1) A landlord shall not be entitled to recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(1A) Where by reason of riot or violence of a mob any material part of the premises in a disturbed areas is wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the landlord shall not be entitled to -

(a) the standard rent and permitted increases due for the premises,

(b) recover possession of such premises merely on the ground of non-payment of standard rent and permitted increase due.

during the period in which such premises remain so destroyed or unfit.

(2) No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, 1882.

(3)(a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due (and thereafter,

(i) continue to pay or tender in court such rent and permitted increases till the suit is finally decided; and

(ii) pays costs of the suit

as directed by the Court

(4) Pending the disposal of any such suit, the Court may out of any amounts paid or tendered by the tenant pay to the landlord such amount towards payment of rent or permitted increases due to him as the court thinks fit."

7. Section 12(1) disables a landlord from recovery of possession so long as the tenant pays or is ready and willing to pay the amount of a standard rent and permitted increase and observes and performs the other conditions of the tenancy so far as they are consistent with the provisions of the rent Act. In a case where there is dispute as to the amount of standard rent or permitted increase as by fiction the tenant is deemed to be ready and willing to pay such amount if before the expiry of the period of one month of the notice referred to in sub-section (2), he makes an application to the court under sub-Section (3) of Section 11 and therefore pays or tenders the amount of rent or permitted increase specified in order made by the court as per explanation appended to Section 12. Thus the guarantee afforded to the tenant under Section 12 to continue in the suit premises as a tenant by the deeming fiction in case if firstly the dispute is raised or amount is paid within one month after notice referred in sub-Section (2) of

Section 12 and secondly if the application is made to the court under sub-Section (3) of Section 11 and thirdly, thereafter pays or tenders the amount of rent or permitted increase in the order made by the court. A notice under Section 12(2) is required to be replied or the arrears of rent paid or dispute with respect to the standard rent to be raised within a period of one month from the date of notice. So far as filing of application under Section 11(3) is concerned, there is no period prescribed. Every expeditious action is called for from the tenant to prove the bona fides of the tenant disputing the rights of the landlord in the claim of a standard rent or permitted increase. A clear distinction has to be kept in mind that is resisting the claim for excess rent or permitted increase and secondly the determination of standard rent or permitted increase and right to pay the same.

8. It is now well settled by the decisions of the Supreme Court and the decision of this court that only way to prevent a decree for eviction being passed under Section 12(3)(a) of the Act is that the tenant must pay the entire arrears of rent or raise the dispute in regard to standard rent or permitted increase before the expiry of one month from the date of service of notice under Section 12(2). The earliest judgement is of Division Bench of this court in AMBALAL VS. BABALDAS reported in 3 GLR 625, wherein the court held that a proper interpretation of Section 12(3)(a) and the scheme of the entire section that the dispute in regard to the standard rent or permitted increases contemplated is one which is in existence at the date of notice under Section 12(2) or any date before the expiry of one month from the date of its service and not the one raised subsequently in written statement with a view to avoid the operation of Section 12(3)(a). This view was doubted by B.J. Diwan, J, as his Lordship then was, and it was considered that the view no longer holds good in view of the decision of the apex court in VORA ABBASBHAI ALIMAHOMED VS. HAJI GULAMNABI HAJI SAFIBHAI reported in AIR 1964 SC 1341. On a reference the Division Bench of this court in CHUNILAL SHIVLAL VS. CHIMANLAL reported in 7 G.L.R. 945 held that the observation of the Supreme Court in Vora Abbasbhai's case cannot be regarded as having the effect of overriding the decision in Ambalal's case (supra). Thus, the law laid down in Ambalal's case is regarded as a good law even after Vora Abbasbhai's case. The view taken in Ambalal's case was approved by the Full Bench of this court in the case of RAMNIKLAL DWARKADAS MODI VS. MOHANLAL LAXMICHAND AND OTHERS reported in AIR 1977 GUJ. 15. The Full Bench in Ramniklal's case dealing with the

stage at which the dispute to the standard rent could be raised and also the manner in which it could be raised, laid down three propositions of law. The third proposition is a relevant proposition for our purpose and it is as follows:-

"The tenant can also claim protection from the operation of Section 12(3)(a) of the Act by raising disputes as to the standard rent either prior to the notice under Section 12(2) of the Act or by reply to the notice but in this case the tenant must do so within one month from the date of receipt of notice referred to Section 12(2) of the Act."

9. The apex court in the case of HARBANSLAL JAGMOHANDAS VS. PRABHUDAS SHIV LAL reported in AIR 1976 SC 2005 held the decision of the Supreme Court in VORA ABBASBHAI's case has not overruled the decision of the Gujarat High Court in AMBALAL's case. The apex court on thorough analysis of the ABBASBHAI's case and another decision of the apex court in DHANSUKKLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF reported in AIR 1968 SC 1109) held that tenant can only be considered to be ready and willing to pay if before the expiry of the period of one month after notice referred in sub-section (2) makes an application to the court under sub-Section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increase specified by the court. The court held thus: " The tenant can claim protection from the operation of Section 12(3)(a) of the Act only if the tenant makes an application within one month of the notice terminating the tenancy by raising a dispute as to the standard rent.

10 Ms. Rupal Patel has heavily relied on the decision of the apex court reported in IBRAHIM ABDULRAHIM SHAIKH VS. K.S. AGARWAL reported in AIR 1994 SC 1609 wherein it is held that the application under Section 11(3) for fixation of rent need not be filed within one month on the receipt of the notice. I have gone through the said case. In fact, this case more supports the case of the petitioner than the respondent. It is of course true that in the said case it is held that application under Section 11(3) for fixation of standard rent need not be filed within one month from the date of receipt of notice. There can be no dispute with this proposition of law. The question in the present case is as to whether the defendant-tenant has become liable to be evicted under Section 12(3)(a) of the Act as he has not disputed increase in standard rent and permitted increased claim in notice or paid all arrears of rent within a period of

one month from the date of notice. So far as this question is concerned, the apex court following earlier judgement in HARBANSLAL JAGMOHANDAS's case (supra) has upheld the view of the Gujarat High Court that tenant on receipt of the notice from the landlord claiming arrears of rent and also permitted increase unless disputes the same within one month from the date of receipt of the notice is not entitled to claim the benefit under Section 12(3) of the Act. On analysing the material provisions of Section 11 and 12 of the Act the court held thus:-

> "The landlord put the tenant on notice of his negligence and to make payment thereof within one month from the date of the receipt of the notice and on disputation is enjoined to seek remedy under S. 11(3) for determination of the standard rent or permitted increases. If he fails to dispute and omits to pay the arrears within one month from the date of the receipt of the notice, he became liable to be evicted under Section 12(3)(a) of the Act. Admittedly the statute did not prescribe any period of limitation under S. 11(3) to lay the application for fixation of standard rent or permitted increases. Therefore, by necessary construction of Ss. 11 and 12, what this Court appears to have intended was that the tenant should dispute the standard rent or permitted increases within one month from the date of the receipt of the notice and then file the application under S. 11(3). It would not appear to have been meant that the application under S. 11(3) should also be filed within one month from the date of the receipt of the notice. But expeditious action is called for to prove the bona fides of the tenants disputing the right of the landlord in the claim of standard rent or permitted increases."

11. In the instant case it is not in dispute that the defendant has not replied to the notice dated 6.4.1977. He neither raised any dispute with respect to standard rent nor deposited the arrears of rent within a period of one month from the date of receipt of the notice dated 6.4.1977. The requirement of Section 12(3)(a) of the Act is (i) that the rent is payable by month (ii) the amount of standard rent and permitted increase is not disputed (iii) standard rent and permitted increase are unpaid for six months or more (iv) the tenant has received notice under Section 12(2) and (v) the tenant has neglected to pay standard rent and permitted increase for such period within a month after receipt of notice under Section

12(2) of the Act. So far as the requirements 1 to 4 are concerned, there is no dispute that they are fulfilled in the present case. On the requirement No. (v) the contention of the respondent-tenant is that the first notice received on 13.10.1975 which was replied vide letter dated 1.11.1975 and therefore there was no necessity of giving reply to notice dated 6.4.1977. In my view this contention is not sustainable. Section 12(2) refers to the last notice before filing of the suit. If the landlord-plaintiff has given more than one notice and if the tenant wants protection under the provisions of Section 12(1) of the Act to show his readiness and willingness to pay arrears of rent, he must remain alert and continue to reply to the notice given by plaintiff landlord. Another contention is that the rent for the period 1.7.1975 to 30.11.1975 were sent by money orders Exh. 23, 24 and 25. The said money orders were refused and therefore it was not obligatory for the tenant to continue to send rent by money order. Ms. Rupa Patel has relied on the decision of this court in LILAVANTI DHIRAJLAL BORADIYA VS. SONI HARJIVAN DEVJIBHAI reported in 16 G.L.R. 1002. It is held in that case that if the landlord refuses to accept the amount tendered by money order the tenant is not bound to repeat the remittance of the said amount again. This case is of no assistance to the petitioner. In the present case, so far as money order Exh. 23 is concerned, the case of plaintiff is that it was refused for the reasons that it did not include electricity charges. The first appellate court found that inadvertently instead of electricity charges it was mentioned water charges. It was an inadvertent mistake and there was no justified ground for the plaintiff to refuse the money order. In my opinion the view of the learned judge of the appellate court is not correct. How the water charges could be understood as electric charges by the landlord. Similarly, the money order at Exh. 24 was also not of the full rent plus electricity charges. In any case, if money orders were not accepted for any reason, tenant had an opportunity to deposit the same or to pay the same when he received the notice dated 6.4.1977. In any case, this will not obviate the tenant from his obligation to give a reply to the notice under Section 12(2) if he wants protection under Section 12(1). The learned counsel has also relied on the decision of this court in the case of BHALCHANDRA N. VAKIL VS. CHANDULAL MOHANLAL DARJI 1983 G.L.H. (U.J.) 8. The said case also pertains to refusal of money order by the landlord. I have already dealt with this aspect. Thus, in the present case, the fifth requirement under Section 12(3)(a) that the tenant has neglected to pay the standard rent and permitted increase

within a period of one month after receipt of the notice under Section 12(2) of the Act is also fulfilled. As all the requirement of Section 12(3)(a) of the Act is fulfilled the plaintiff is entitled to decree for eviction and the tenant respondent is liable to be evicted. Both the courts below have committed manifest error in not granting decree for eviction, in disregard to mandate of Section 12(3)(a) of the Act. In Ambalal's case this court has said that the words "may" used in sub-section 3(a) of Section 12 in its context should be read as "shall". As the instant case falls within the four corners of Section 12(3)(a) and not Section 12(1) there is no alternative but to pass decree for eviction of suit premises.

12 The upshot of the aforesaid discussion is that this revision application is allowed and the judgement and decree dated 29.1.1982 passed by the Third Extra Assistant Judge, Baroda and the judgement and decree dated 31.7.1980 passed by the judge, Small Causes Court, Baroda in Civil Suit No. 338 of 1977 are set aside and the plaintiff's suit for possession of the suit premises is decreed. The ruling on the question of standard rent remains intact. Rule is made absolute. There shall be no order as to costs.

00000

pkn.